No. 17-130

IN THE

Supreme Court of the United States

RAYMOND J. LUCIA, ET AL., *Petitioners*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF FOR URSKA VELIKONJA AND JOSEPH A. GRUNDFEST AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*[1]

Amici curiae are law professors whose research and teaching focus, among other things, on empirical analysis of the enforcement of the federal securities laws. Joseph A. Grundfest is the William A. Franke Professor of Law and Business at Stanford Law School and served as Commissioner of the United States Securities and Exchange Commission ("SEC" or "Commission") from 1985 to 1990. Urska Velikonja is Professor of Law at Georgetown University Law Center.

We are, to the best of our knowledge, the only academics who have conducted empirical analyses of the outcomes of litigated matters filed by the SEC as administrative proceedings and in federal court. *See* Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Proposal for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143 (2016); Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017); Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901 (2016); Urska Velikonja, *Securities Settlements in the Shadows*, 124 YALE L.J. F. 126 (2016), http://www.yalelawjournal.org/forum/securities-settlements-in-the-shadows. Professor Grundfest is also founder and principal investigator at the Stanford

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[1] All parties have consented in writing to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

Securities Class Action Clearinghouse, an online resource that tracks activity in every federal class action securities fraud proceeding filed since the effective date of the Private Securities Litigation Reform Act of 1995, Pub L. 104-67, 109 Stat. 737. *See* securities.stanford.edu.

INTRODUCTION AND SUMMARY OF ARGUMENT

Briefs filed in this case cite to news articles alleging that the SEC is more likely to prevail in lawsuits decided by ALJs than in cases litigated in federal district courts.[2] These articles also contend that following the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, the Commission is more likely to litigate matters before administrative law judges than prior to the Act's adoption.

In particular, a Wall Street Journal article based on data analyzed by a Wall Street Journal reporter concludes that "'[t]he SEC brought more than four out of five of its enforcement actions' before its ALJs, 'up from less than half of them a decade earlier.'" Petition for Writ of *Certiorari* at 33, No. 17-130, 2017 WL 3189046 (filed July 21, 2017) (quoting Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015) ("Eaglesham"). One *amicus*

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[2] *See, e.g., e.g.*, Petition for a Writ of *Certiorari* at 33, No. 17-130, 2017 WL 3189046 (filed July 21, 2017) (quoting Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J (May 6, 2015); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 9, No. 17-130, 2017 WL 3713062 (filed August 25, 2017) (citing Eaglesham).

asserts that "[b]etween October 2010 and March 2015, the SEC won 90% of the cases it brought before its ALJs, as compared with 69% of cases before district court judges." Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioners at 9, No. 17-130, 2017 WL 3713062 (filed August 25, 2017) (citing Eaglesham). Summarized differently, "[s]ince the Dodd-Frank Act of 2010 expanded the Commission's administrative enforcement authority, the Commission has brought more than 80% of its enforcement proceedings in its in-house tribunal, where it has won over 90% of the time." Brief for Petitioners at 3, No. 17-130, 2018 WL 1027816 (filed February 21, 2018) (citing Eaglesham). In much the same vein, an earlier New York Times article reported that, in its review of cases filed in 2011, the SEC prevailed in 88% of cases it filed before ALJs compared to 63% of cases it filed in federal district court. *See* Gretchen Morgenson, *At the SEC, a Question of Home-Court Edge*, N.Y. TIMES, Oct. 5, 2013, http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html.

Taken together, these articles foster the impression, relied upon by briefing in this case, that the Commission has a "home court" advantage when litigating before its administrative law judges. The articles also foster the impression that the Commission is filing more litigation as administrative proceedings to capitalize on this alleged advantage.

We take no position on the merits of this case and express no view as to its resolution. We also express no view as to the fairness or efficiency of the procedural rules governing the Commission's

administrative process.[3] Those questions are quite distinct from the constitutional question before the Court. Instead, we write exclusively to address two empirical questions raised by the debate over the Commission's reliance on administrative enforcement of the federal securities laws.

First, is there statistically reliable evidence that ALJs systematically resolve cases in a manner that differs from the resolution of equivalent Commission actions filed in federal district court?

Second, has the Commission steered a disproportionate share of contested proceedings to ALJs because the Commission is more likely to prevail before those ALJs?

Each of us has independently addressed these questions through empirical analyses that rely on different databases and that apply different analytic techniques. *See* Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Proposal for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143 (2016); Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017). We have each independently reached identical conclusions. Contrary to the suggestions that appear in the press, there is no statistically reliable evidence that the Commission has a "home court" advantage before ALJs. There is also no statistically reliable evidence that the Commission is steering a disproportionate share of litigation to the administrative forum in order

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[3] For analysis of the fairness and efficiency of the procedures followed in the Commission's administrative proceedings, *see* generally Grundfest, *supra*, 85 FORDHAM L. REV. 1143 (2016).

to capitalize on this non-existent advantage. *See* Grundfest, *supra*, 85 FORDHAM L. REV. at 1175-84; Velikonja, *supra*, 92 WASH. L. REV. at 341-62.

To test whether these findings are robust to more recent enforcement decisions by the Commission, this *amicus* brief reports on the findings of an empirical analysis that examines every enforcement action filed by the SEC from the beginning of fiscal year 2007 through September 30, 2017, the end of the SEC's 2017 fiscal year, and resolved prior to January 1, 2018. We explain our data collection and classification methodology in the main body of our argument (at pp. 8-10) and document significant classification problems with the data upon which the Wall Street Journal and New York Times rely. Contrary to the conclusions reported in those articles and advanced in the briefing in this case, we find no statistically significant difference in the SEC's success rate in federal district court as opposed to before ALJs based on the analysis of the expanded dataset reported in this *amicus* brief. We also find that the SEC has continued to litigate a large majority of contested proceedings in federal district court, and not before its ALJs. Our analysis of the more recent data is thus also inconsistent with the suggestion of "home court" bias in matters litigated before the Commission's ALJs.

We are aware of no published academic study that reaches conclusions inconsistent with those expressed in this *amicus* brief, or with our prior articles addressing this question. We recognize, however, that the absence of a statistically significant difference in ALJ and federal district court resolutions as analyzed in this submission, and in our prior scholarship, cannot establish that there is no case, or set of cases,

in which outcomes before an administrative law judge and before a federal district court would not have differed. We are therefore not arguing that the forum in which a case is litigated is universally irrelevant.

Our analysis is, instead, based on comparisons of averages, and the data indicate that, on average, the forum is not outcome determinative. Moreover, the absence of a difference in average outcomes does not imply the absence of a difference in the perceived, *ex ante* probability of success by each litigant in each forum. In particular, we are unable to measure the quality of each case and the expected likelihood of success on the merits for either party in either forum. The implications of this limitation on the data are potentially significant. If, for example, the SEC is sending its stronger cases to ALJs, its success rates before ALJs should be higher than in federal court, all else being equal. Similarly, if the SEC is sending more difficult cases to ALJs, then the finding that there is no difference in average outcomes between the two forums would imply that the ALJ process is biased in favor of the SEC. If, however, the cases sent to the different forums have similar average chances of success on the merits, then our results imply that conclusions reported in the Wall Street Journal and relied on in the briefing have no empirical support and should not be relied on.

For these and other reasons described below, data describing win-loss ratios before ALJs and in federal court cannot, in and by themselves, establish the presence or absence of a "home court" advantage. We accordingly urge this Court to address all data of this sort, including the analyses presented in the Wall Street Journal, The New York Times, in our academic

publications, as well as in this *amicus* brief, with extreme caution. This Court should resolve the question presented through the application of standard interpretive techniques that do not refer to the empirical questions addressed in this *amicus* brief.

ARGUMENT

The Securities and Exchange Commission can often, but not always, exercise discretion as to whether to file an enforcement proceeding in an administrative forum or in federal district court. Some actions, such as proceedings seeking a temporary restraining order, an asset freeze, or the appointment of a receiver must be filed in federal court because only a federal court can order the remedy sought by the Commission. *See, e.g.*, Andrew Ceresney, Dir., SEC Div. of Enf't, Keynote Speech at New York City Bar 4th Annual White Collar Institute (May 12, 2015), https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html. In contrast, the statutes require that the Commission file other actions as administrative proceedings, including actions to suspend or terminate the registration of public companies for failure to file periodic reports, follow-on proceedings to bar individuals or entities from the securities industry, or charges of failure to supervise employees who committed serious securities violations. *See e.g.*, 15 U.S.C. §§ 78l(j), 78o(b)(4). In most instances, however, the SEC can choose the forum in which it litigates contested cases.

Since 1990, the SEC has had the authority to seek monetary penalties, including civil fines, in administrative cease-and-desist proceedings, but only against registered persons, including broker-dealers

and investment advisers like the petitioners. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, §§ 102, 202-203, 301, 401, 104 Stat. 931, 933-35, 937-40, 941-44, 946-49. The Dodd-Frank Act expanded the Commission's powers to seek civil fines in administrative cease-and-desist proceedings to include actions against any individual or entity, regardless of whether they were registered with the Commission. Dodd-Frank thereby dramatically expanded the domain of cases in which the Commission could exercise discretion in forum selection while still obtaining substantial civil fines. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P, 124 Stat. 1376, 1862-64. Our analysis focuses on the subset of cases in which the Commission can exercise discretion over forum selection.

I. The SEC Brings a Small Minority of Contested Actions as Administrative Proceedings.

Media reports suggesting the existence of a "home court" advantage appear to rest on incomplete data collection and classification methodologies that are subject to material dispute.[4] To establish the foundation for this conclusion, we begin with a detailed explanation of our data collection methodology. To assemble the data set that informs our analysis, we rely principally on annual *Select SEC and Market Data* reports from 2007 to 2016, published by the Commission. *See e.g.*, SEC, Select SEC and

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[4] The media reports discussed in this *amicus* brief have not publicly disclosed the raw data upon which their conclusions are based, nor have they explained precisely how they collected, categorized, or analyzed their data.

Market Data Fiscal 2016, https://www.sec.gov/files/2017-03/secstats2016.pdf. These reports include a complete list of SEC enforcement actions filed in a given fiscal year. We supplement that list by reviewing administrative and court dockets to ensure that the data set is complete, and to add actions filed in fiscal 2017 for which the SEC has yet to release a report.

We exclude from the analysis all actions in which the SEC does not pursue an original violation of federal securities laws. We therefore exclude: (1) follow-on administrative proceedings in which the SEC seeks to suspend or bar a respondent previously found liable for violating securities and related laws; (2) Section 12(j)[5] actions to delist a company; (3) subpoena enforcement proceedings; and (4) contempt proceedings. The first two categories of listed actions can be filed *only* in an administrative proceeding; the latter two can be filed *only* in federal court. Thus, in no case that falls in any of these four categories does the Commission exercise any discretion as to forum selection. We find that in all of these actions, the Commission's success rate is substantially higher than in actions in which the Commission must establish liability for a predicate securities law violation. *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 914-15 n.71 (2016). Unless otherwise indicated, we also exclude from our analysis resolutions predicated on collateral

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[5] 15 U.S.C. §§ 78l(j).

estoppel arising from a prior criminal conviction for the same violation.[6]

We tabulate and report the information both by defendant and by enforcement action. We present both forms of analysis separately to account for the fact that the SEC sues some defendants individually and joins others in a single action. There appears to be no systematic basis upon which the Commission decides whether to aggregate multiple defendants in a single action, or whether to file multiple individual actions against multiple defendants. As demonstrated below, our conclusions remain the same in every variation in categorization.

We also exclude from the analysis all relief defendants. These defendants are named in Commission complaints only so the agency can obtain disgorgement, and not so it can establish that any relief defendant violated any of the securities laws. We also review charging and related documents in each proceeding to determine whether the action was initially settled or contested, and whether the action was filed in federal court or as an administrative proceeding.

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[6] These actions ordinarily result from a joint investigation by civil and criminal authorities. Both civil and criminal authorities often file parallel charging documents on the same day. The SEC's case is then usually stayed until the criminal case is resolved. Once prosecutors have secured a guilty plea or conviction, the SEC moves for summary judgment or settlement. In our sample, the SEC wins all such summary judgment cases, and all but one of these cases were filed in federal court. Excluding these actions ensures that the data are not biased so as to inflate the Commission's success rate.

Our data indicate that, from fiscal 2007 through 2017, defendants' initial settlement rate in standalone actions varied from a low of 32% in fiscal 2009 to a high of 55% in fiscal 2015, with an average of 41%.[7] The number of settled actions initially filed as administrative proceedings increased considerably during this period. Between fiscal 2007 and 2010, before the Dodd-Frank amendments took effect, an average of 40% of settlements were filed as administrative proceedings.[8] That share increased to 83% in fiscal 2015. *See* Urska Velikonja, *Securities Settlements in the Shadows*, 124 YALE L.J. F. 126, 130 (2016) ("Velikonja, *Settlements*").

This increase in the percentage of settled actions filed as administrative proceedings is readily explained as a consequence of the bargaining dynamics in settlement proceedings that have no implication for the presence of an alleged SEC "home court" advantage before ALJs. In particular, Dodd-Frank allows both non-registered respondents and the Commission to settle matters as administrative proceedings whereas, prior to Dodd-Frank, precisely the same settlements would have been filed in federal court. If defendants perceive administrative cease-and-desist settlements to signal less culpability and to involve exposure less severe than that associated with the entry of a federal injunction, then defendants would, all other factors equal, prefer to settle a matter

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[7] These data include standalone actions filed in court and in administrative proceedings, and exclude follow-on and delinquent filing actions.

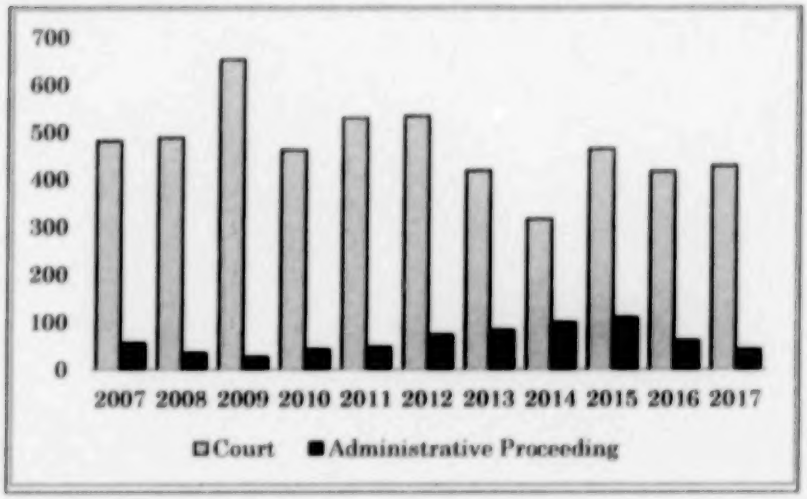
[8] This result is conditioned on a count of respondents, not of proceedings.

if it is filed as an administrative proceeding than if it is filed in federal court. The increase in settlements initially filed as administrative proceedings may therefore reflect defendant preferences more than strategic forum selection decisions on the part of the Commission. *See* Joseph A. Grundfest, *supra*, 85 FORDHAM L. REV. at 1151-52, 1182-83; Velikonja, *Settlements*, 124 YALE L.J. F. at 125-26.

But contrary to claims advanced in the Wall Street Journal and cited in the briefing, the *overall* share of *contested* cases (rather than *settled* cases) filed in administrative proceedings remains small post-Dodd-Frank, although the relative increase in the share of contested cases filed in administrative proceedings is substantial and statistically significant. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 342 (2017) ("Velikonja, *ALJ Bias*"). Between fiscal 2007 and 2010, 7% of respondents who did not initially settle with the SEC faced the agency in an administrative proceeding. By fiscal 2014, 23% of non-settling respondents faced the SEC in an administrative proceeding. The relative share of non-settling respondents sued in an administrative proceeding has since declined to pre-Dodd-Frank levels. *See* Figure 1.

FIGURE 1

Filings in Contested Cases by Forum (by Number of Defendants)[9]



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In sum, the WSJ and related news stories incorrectly suggest that the SEC litigates a material percentage of contested actions before ALJs. At peak, 23% of non-settling respondents in standalone actions faced the SEC before an ALJ. Currently, about 7% of respondents do.

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[9] Figure 2 in the Appendix shows filings in contested actions using the enforcement action as a unit of analysis. Between fiscal 2007 and 2010, 10% of enforcement actions that were not initially settled were filed as administrative proceedings. At peak in fiscal 2014, 38% of initially contested enforcement actions were filed as administrative proceedings.

II. The Data Reject the Hypothesis That the SEC Prevails More Frequently Before ALJs Than in Federal District Court.

Most defendants who initially contest the SEC's charges, whether in administrative proceedings or in federal court, ultimately settle. Our analysis of outcomes in contested actions excludes these settlements, and also excludes actions that result in a default judgment or voluntary dismissals. Our analysis therefore focuses exclusively on the outcomes of cases filed in fiscal years 2007 to 2017, in which a judge, a jury, or an ALJ issued a decision prior to January 1, 2018. These are the matters that are litigated fully to conclusion.

This sample includes federal court cases decided after a full jury or bench trial, cases decided by summary judgment, and cases dismissed on a contested motion to dismiss. The sample also includes administrative cases in which ALJs issued initial decisions that are not based on respondent's default, including cases in which the ALJ's decision has subsequently been appealed to the Commission[10] and the case remains pending. This sorting yields a list of 791 defendants in 374 enforcement actions, of whom 602 faced the SEC in court (in 273 enforcement actions) and 189 appeared before an ALJ (in 101 enforcement actions).

We measure outcomes as of the point of first decision on liability. That decision may be the result of

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[10] In this Part II of the Argument, we use the term "the Commission" to refer to the five commissioners who review appeals to ALJ rulings. We use the term "SEC" to refer to the agency.

a partial summary judgment or a jury verdict that is later reversed on appeal. It could also reflect an ALJ initial decision that is later reversed by the Commission. The analysis considers only the outcome by the first court and the first ALJ to decide the matter as to defendant's or respondent's liability.[11]

A trial or summary judgment is deemed a victory for the SEC if it prevails on one or more claims against any defendant in a manner that entitles it to relief under the federal securities laws, even if no relief is ultimately awarded. A ruling or verdict for the SEC as to an element of an offense, absent a finding that a defendant actually violated a provision of the federal securities laws, is not counted as an SEC victory because the SEC would still have to establish that a violation occurred.

In Table 1 (pp. 16 and 17 below), we report our initial results by individual defendant and by enforcement action. In rows one, four, and five, we include cases predicated on a prior criminal conviction. In other rows, we exclude these cases. The first three rows report results using each defendant as a unit of analysis; rows four through nine report results by enforcement action. Notes included after Table 1 explain additional measurement variations we

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[11] In some cases, the respondent or the SEC appeals the ALJ initial decision to the Commission, which then issues an opinion deciding the matter after *de novo* review. Of cases that were appealed to the Commission between fiscal 2008 and 2017, the Commission resolved the matter in favor of the respondent as often as it resolved it in favor of the SEC. As a result, our findings and conclusions would not be affected by including resolutions after appeal to the Commission. *See* Velikonja, *ALJ Bias*, 92 WASH. L. REV. at 325 n.63.

used as robustness checks. No matter how we slice the data, the SEC's relative success rate in either forum is consistently between 80 and 90 percent, and in no version of the analysis is there a statistically significant difference in success rates between the two forums.

TABLE 1

SEC Success Rate in Court and in Before an ALJ (2007-2017)

	Court	ALJ
By Defendant (1) (N_{Court} = 602; N_{ALJ} = 189)	88%	85%
By Defendant (2), (3) (N_{Court} = 508; N_{ALJ} = 188)	86%	85%
By Defendant (2), (4) (N_{Court} = 502; N_{ALJ} = 188)	87%	85%
By Enforcement Action (1), (3), (5) (N_{Court} = 273; N_{ALJ} = 101)	85%	83%
By Enforcement Action (1), (3), (6) (N_{Court} = 273; N_{ALJ} = 101)	87%	87%
By Enforcement Action (2), (5), (7) (N_{Court} = 212; N_{ALJ} = 100)	81%	83%
By Enforcement Action (2), (6), (7) (N_{Court} = 212; N_{ALJ} = 100)	83%	87%
By Enforcement Action (2), (5), (8) (N_{Court} = 222; N_{ALJ} = 100)	82%	83%
By Enforcement Action (2), (6), (8) (N_{Court} = 222; N_{ALJ} = 100)	84%	87%

(1) The tally includes summary judgments predicated on a prior guilty plea or conviction.

(2) The tally does not include summary judgments predicated on a prior guilty plea or conviction.

(3) Ten defendants faced parallel criminal proceedings. Where those proceedings were vacated on appeal, the SEC moved to vacate earlier entered settlements or obtained summary judgments. The tally includes them as SEC losses by summary judgment.

(4) Ten defendants faced parallel criminal proceedings and pleaded guilty or were convicted. On appeal, criminal judgments were reversed and the SEC moved to vacate settlements and summary judgments that it obtained on the basis of criminal judgments. These defendants are included in the tally as if the cases were not vacated.

(5) Counting as SEC wins only those multi-defendant actions where the SEC prevailed against all defendants.

(6) Counting as SEC wins those multi-defendant actions where the SEC prevailed against at least one defendant, but may have lost against some.

(7) Excluding from analysis multi-defendant cases, where at least one defendant's resolution is predicated on earlier guilty plea or conviction.

(8) Excluding from analysis multi-defendant cases, where all defendants' resolutions are predicated on earlier guilty pleas or convictions.

Because we study all actions filed in fiscal years 2007 through 2017, regardless of whether all cases filed in a given year have been resolved, concern arises that cases that remain ongoing are the cases that the SEC is more likely to lose. To address this concern, we

also report outcomes by year in which an action was originally filed (*see* Appendix, Figures 3.A and 3.C). All actions filed in fiscal years 2007 and 2008 have been resolved, and only a handful of actions filed in fiscal years 2009 to 2012 remain ongoing (five, one, two, and five cases, respectively). These counts exclude cases stayed for the duration of parallel criminal proceedings. We also report results by the year in which the action was resolved (*see* Appendix, Figures 3.B and 3.D). A year-to-year comparison in outcomes is considerably more variable, as is common when the sample size is small, but there are no obvious trends suggesting that the SEC is more likely to lose actions that take longer to resolve. The presence of ongoing cases is therefore unlikely to change our overall result reported above: the SEC prevails against defendants at very high rates in administrative proceedings and in federal district court, and there is no statistically significant difference in the SEC's success rate between the two forums.

Insider trading cases are, however, different. As shown in Figure 4 in the Appendix, the SEC loses about half of insider trading cases decided both by courts and by ALJs, whereas its success rate in other types of actions is much higher. Insider trading cases represent 9% of contested cases studied but 33% of SEC losses overall. Of contested cases filed in federal district court, insider trading cases represent 12% of our sample but 42% of SEC losses. Of contested cases litigated before ALJs, insider trading cases represent only 2% of the sample, but 7% of all losses. The SEC's success rate before federal district courts and before ALJs in insider trading cases is statistically

indistinguishable. However, because insider trading cases represent a much larger share of the SEC's losses in federal district court, and a much smaller share of its losses before ALJs, any comparison of success rates in these two forums that fails to account for this important variation in case characteristics will be biased.

To address variation in case and defendant characteristics, we apply multivariate logistic regression techniques to test whether there is a statistically significant correlation between the likelihood that the SEC will prevail in an action and the forum in which the matter is litigated. We categorize defendants and actions by subject matter as reported in *Select SEC and Market Data* reports (*i.e.*, broker-dealer, insider trading, investment advisor, issuer reporting, market manipulation, and securities offering cases).[12] We also control for whether the defendant is an individual or an entity and, in some specifications, whether the resolution is based on prior criminal pleas or convictions.

We first analyze the entire dataset using a range of specifications, as described in the discussion of

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[12] Four FCPA cases in our sample were treated as issuer reporting cases, consistent with the SEC's categorization of these actions before fiscal 2011. Eight municipal offering cases were treated as securities offering cases, and six cases against registered transfer agents were treated as investment adviser actions, again consistent with the SEC's categorization of these cases before fiscal 2011. Success rates in FCPA, municipal offering, and registered transfer agent cases are comparable to the SEC's success rate in the categories into which those cases were merged by the Commission (*i.e.*, the SEC prevailed in 3 of 4 FCPA actions, which is consistent with its success rate in issuer reporting cases generally).

Table 1. We then focus on cases filed in fiscal years 2007 to 2012, where all or nearly all cases have been resolved. We then analyze resolutions handed down in the years spanning 2012 to 2017, during which our dataset includes all or nearly all actions that have been resolved in a given fiscal year. We perform the analysis with the observations defined by individual defendant as well as by enforcement action. Select regression results are reproduced in the Appendix, Tables 2.A, 2.B, and 2.C. Our data set and the full set of regression results are available on-line at https://scholarship.law.georgetown.edu/scb/79/.

The forum in which a proceeding was heard, whether federal district court or administrative, was not significantly correlated with outcomes in all but 3 of 33 regression analyses (using the standard 5% level of significance).[13] In those three analyses, the results suggest that the SEC is at a *dis*advantage when litigating before ALJs. In no specification do we find evidence of home court *advantage*. The results are robust. As explained in Table 1, the data are coded several different ways to account for the presence of multi-defendant actions and for parallel guilty pleas, and we perform analyses of every variation.

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Our conclusions differ from those reported in the Wall Street Journal and New York Times for several reasons. First, we include in our analysis all resolutions handed down by a third-party adjudicator, such as summary judgments, and do not rely

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[13] One of three statistically significant outcomes, suggesting that the SEC is at a disadvantage when litigating before ALJs, is reported in Table 2.C in the Appendix.

exclusively on cases decided after a trial or hearing. Inasmuch as a victory at the summary judgment stage is every bit as valuable as a victory after trial—indeed, it can be argued that a victory at summary judgment is a superior measure of the merits of a litigant's position—there appears to be no coherent reason to exclude summary judgments from the analysis. Thus, to the extent that the SEC tends to prevail more frequently at the summary judgment stage, as appears to be the case,[14] the exclusion of summary judgment and other pre-trial resolutions biases the data against the SEC.

Second, our analysis adjusts for the fact that forum selection is not random across all types of cases. The SEC tends to litigate certain types of cases more frequently in federal district court (*e.g.*, insider trading and offering fraud cases) and other types of cases more frequently before ALJs (*e.g.*, broker-dealer and investment advisor violations). This distinction is significant from an analytical perspective because the SEC is more likely to lose when litigating insider trading claims than is it to lose when litigating other types of securities law violations, regardless of forum. Unless an analysis properly controls for this factor, it is easy to reach the mistaken conclusion that the SEC's success rate in federal district court is lower than it is before ALJs, when, in reality, the finding

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[14] In our sample, the SEC prevailed at summary judgment against 408 of 423 defendants (a 96.4% win rate). Even if summary judgments based on prior convictions or guilty pleas are excluded, the SEC prevailed at summary judgment against 310 of 325 defendants (a 95.4% win rate). The SEC's win rate at summary judgment is higher than in cases decided after trial. *See also* Velikonja, *ALJ Bias*, 92 WASH. L. REV. at 349.

should be that the SEC's success in litigating insider trading actions is lower than its success in litigating other types of claims, and that insider trading cases are litigated overwhelmingly in federal district court, not in administrative proceedings.

III. Empirical Analysis of the Outcome of Contested Enforcement Proceedings Sheds No Light on the Question Presented in this Case.

The absence of a statistically significant difference in the resolution of matters litigated in federal district court and in administrative proceedings does not mean that there is no case, or no set of cases, in which outcomes in those individual cases would not have differed if litigated in a different forum. Thus, we do not claim that the choice of forum is irrelevant in every instance. Instead, the proposition advanced in our analysis is, instead, that the forum selection decision seems not to have an effect when measured on average.

Three additional caveats bear mention in connection with any analysis of outcomes in litigated enforcement proceedings. First, these analyses consider only outcomes in litigated matters, but most SEC enforcement actions are settled, including the majority of actions that are initially contested. A relatively higher share of defendants sued in court settle than do respondents who litigate before ALJs. As noted above, we cannot measure the quality of each type of case. But if the cases are similar in both forums, then defendants' greater willingness to settle in cases filed in federal district court biases the

comparison in favor of a higher SEC success rate in administrative proceedings.[15]

Second, the SEC does not litigate every case to conclusion. Instead, the Commission will move to dismiss the action where further prosecution of an entity is deemed unnecessary because the sole owner has been convicted or has died, because a parallel settled action is filed in an administrative proceeding, or for a variety of other reasons that often are not specified. Courts regularly grant these motions. Because researchers are unable to define precisely the cases that are voluntarily dismissed for these procedural reasons, rather than for other more substantive causes related to the merits, we exclude these observations from our analysis. The existence of these voluntary dismissals for indeterminate reasons generates noise in the data that complicates the ability to make strong assertions regarding the effects of SEC forum selection decisions.

Third, and most important, a finding that there is no average difference in outcomes between matters litigated in federal district court and matters litigated in administrative proceedings does not imply that there is no difference in the *a priori* probability of success in each forum. Contested actions filed in court and in administrative proceeding are similar on average, but not identical. Courts are more likely to

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[15] For example, if defendants with a 30% or lower chance of success are more likely to settle when the action is litigated in court than before an ALJ, the pool of contesting litigants in federal district court will include fewer defendants with a low chance of success and more who face better odds. As a result, all else equal, the SEC's expected success rate in court should be lower than before an ALJ.

find that the defendant violated scienter-based provisions of securities laws than are ALJs, but court cases are somewhat less likely to result in a defendant's bar or suspension from the securities industry or from practicing before the Commission as accountant or attorney. *See* Velikonja, *ALJ Bias*, 92 WASH. L. REV. at 356-57. Median civil fines imposed in both forums are similar, but at the 75th percentile, the civil fines are higher in federal district court. *Id.* at 356. Thus, if the SEC systematically directs easier-to-win cases to ALJs, its success rates before ALJs should be higher, all other factors equal. Similarly, if the SEC systematically directs its more difficult cases to ALJs, then the absence of a statistically significant difference in outcomes would imply that the ALJs process is biased in favor of the SEC. If, however, the cases sent to each forum have similar chances of success on the merits on average, then our results imply that widely-reported press analyses suggesting a "home court" advantage in administrative proceedings would be incorrect.

* * *

We urge the Court to ignore references to statistical disparities in outcomes, suggestions that the SEC has a "home court" advantage in administrative proceedings, and that ALJs have a bias observable through the analysis of aggregate data. Every published academic study of which we are aware, and the additional analysis reported in this *amicus* brief, supports the conclusion that there is no statistically significant difference in the SEC's probability of prevailing in federal district court or in an administrative proceeding. We further emphasize that our conclusions should not be over-interpreted to

imply an absence of ALJ bias in any one case, or in any set of cases. Moreover, because researchers cannot evaluate *ex ante* case quality, or account for other selection biases, a comparison of outcomes in contested enforcement actions can only support cautious, qualified conclusions about the potential presence or absence of bias in any forum.

CONCLUSION

Amici end where we began. We take no position on the merits of this case and express no views as to its resolution. We also take no position as to the fairness or efficiency of the procedural rules governing the ALJ process, which is a question distinct from the one before the Court. Instead, we urge the Court to address the question presented as a matter of constitutional interpretation as to which the available statistical evidence provides no meaningful insight.

Respectfully submitted,

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February 28, 2018

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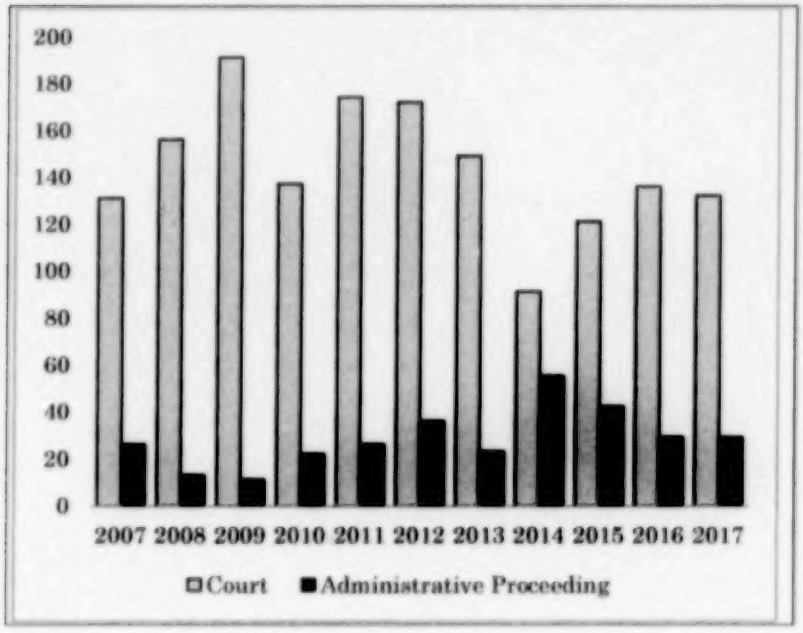
APPENDIX: DATA AND TABLES

FIGURE 2

Contested Actions Filings (enforcement action as the unit of analysis)



App. 2

FIGURE 3.A

Success Rate by Year of Filing (by defendants)

Success rate is tallied by individual defendant and by the fiscal year in which the action is filed. The tally does not include summary judgments based on prior conviction or guilty plea. $N_{Court} = 508$, $N_{ALJ} = 188$

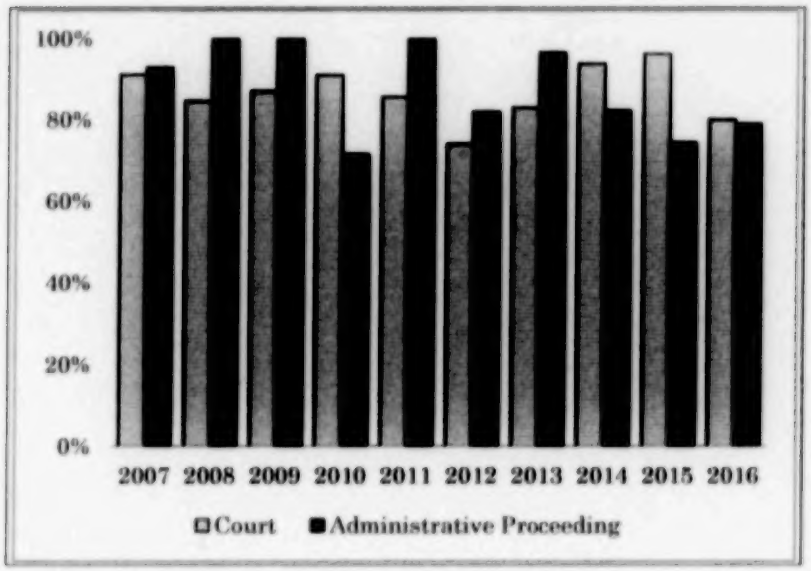


FIGURE 3.B

Success Rate by Year of Resolution (by the number of defendants)

Success rate is tallied by individual defendant and by the fiscal year in which the action is resolved. The tally does not include summary judgments based on prior conviction or guilty plea, but does include ten defendants whose settlement or summary judgment loss against the SEC was vacated. N_{Court}=508, N_{ALJ}=188.

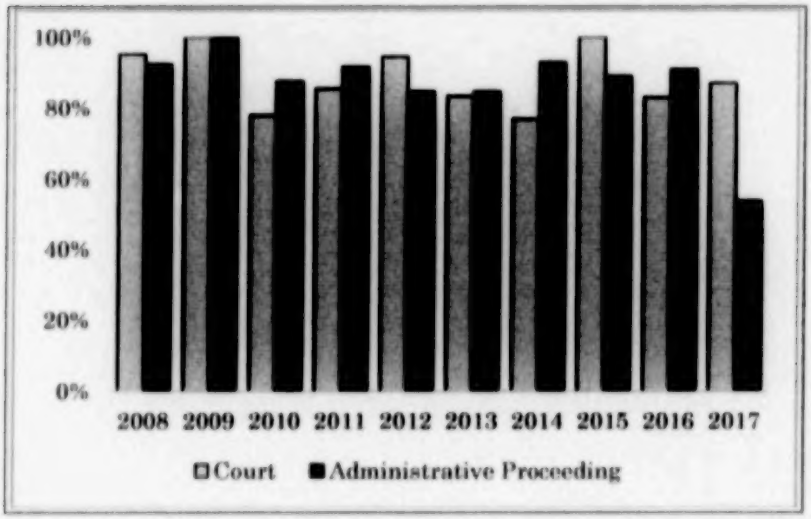


FIGURE 3.C

Success Rate by Year of Filing (enforcement action as the unit of analysis)

Success rate is tallied by enforcement action and by the fiscal year of filing. The tally does not include summary judgments based on prior conviction or guilty plea but does include ten defendants whose settlement or summary judgment loss against the SEC was vacated. $N_{Court} = 212$, $N_{ALJ} = 100$.

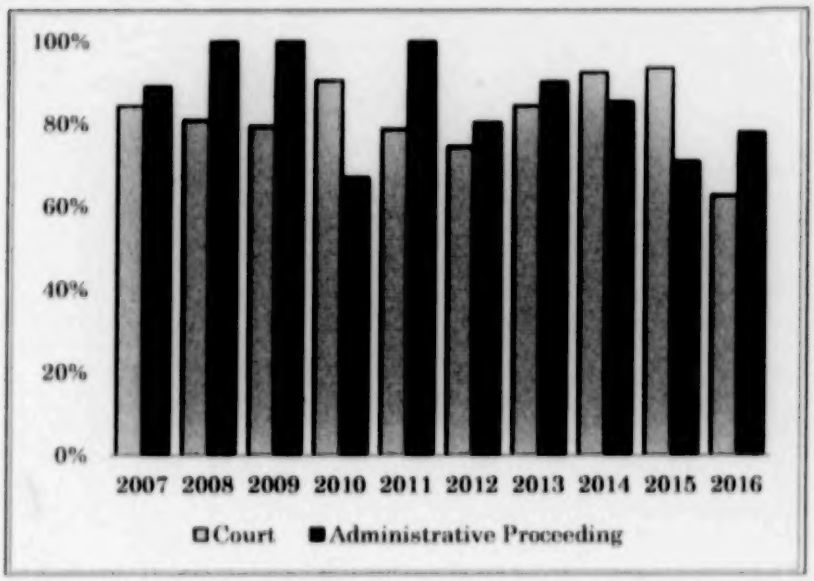


FIGURE 3.D

Success Rate by Year of Resolution (enforcement action as the unit of analysis)

Success rate is tallied by enforcement action and by the fiscal year in which the action is resolved. The tally does not include summary judgments based on prior conviction or guilty plea, but does include defendants whose settlement or summary judgment loss against the SEC was vacated. $N_{Court} = 212$, $N_{ALJ} = 100$.

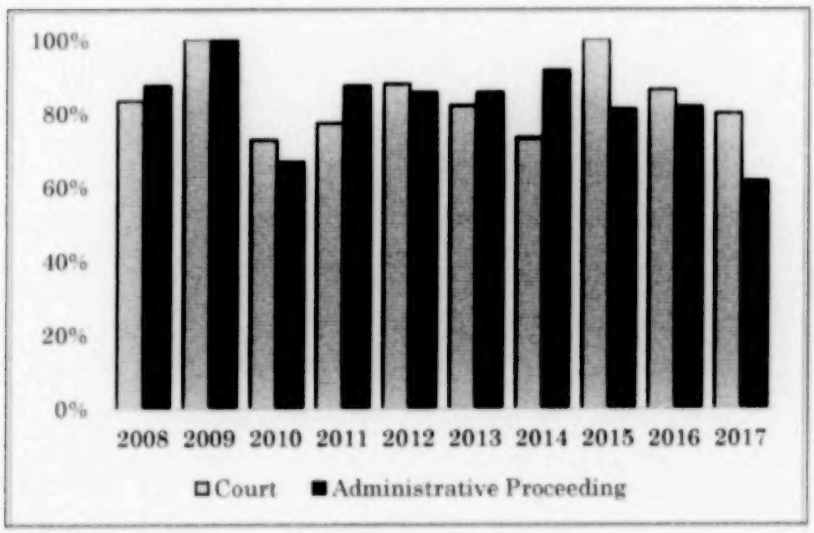
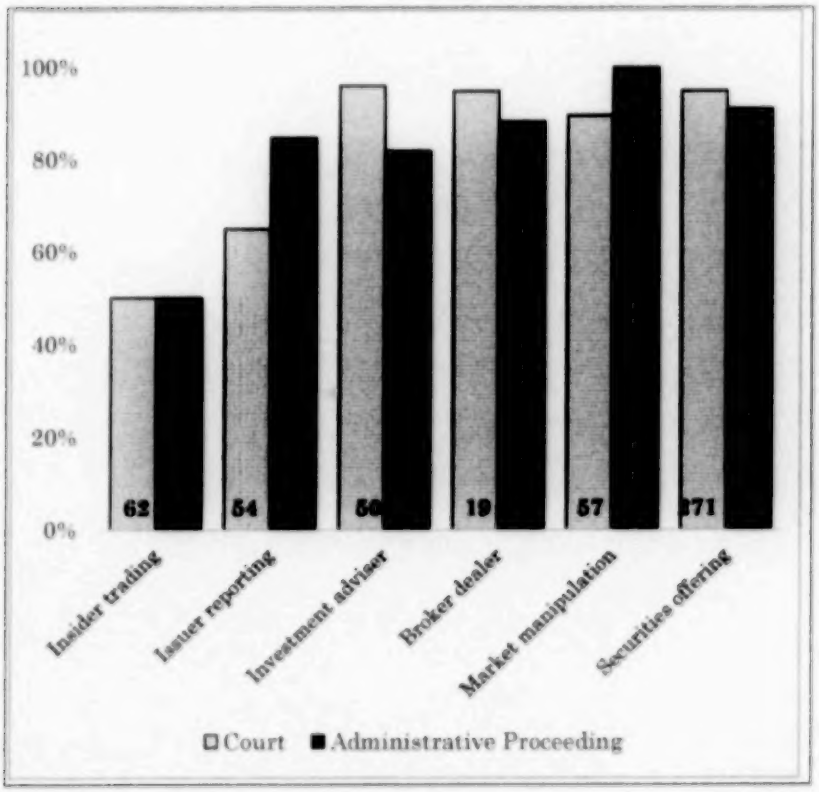


FIGURE 4

SEC's Success Rate by Type of Case (by defendant)

The figure does not include summary judgments predicated on collateral estoppel. The number of defendants in each case category is bolded.



Logistic Regression Results

The following list describes the various permutations we used when analyzing the data. We analyzed every permutation for the entire dataset. We separately analyzed cases filed between 2007 and 2012, where all or nearly all cases have been resolved, and resolutions handed down in the years spanning 2012 to 2017, during which our dataset includes all or nearly all actions that have been resolved in a given fiscal year. We performed the analysis with the observations defined by individual defendant as well as by enforcement action.

We reproduce some regression results in Tables 2.A, 2.B, and 2.C below. We report statistical significance using conventional methods (*** $p<0.01$; ** $p<0.05$). Standard errors are reported in parentheses.

The list of permutations used in regression analyses:

(1) The tally includes summary judgments predicated on a prior guilty plea or conviction.

(2) The tally does not include summary judgments predicated on a prior guilty plea or conviction.

(3) Ten defendants faced parallel criminal proceedings. Where those proceedings were vacated on appeal, the SEC moved to vacate earlier entered settlements or obtained summary judgments. The tally includes them as SEC losses by summary judgment.

(4) Ten defendants faced parallel criminal proceedings and pleaded guilty or were convicted. On appeal, criminal judgments were reversed and the SEC moved to vacate

settlements and summary judgments that it obtained on the basis of criminal judgments. Such defendants are included in the tally as if the cases were not vacated.

(5) Counting as SEC wins only those multi-defendant actions where the SEC prevailed against all defendants.

(6) Counting as SEC wins those multi-defendant actions where the SEC prevailed against at least one defendant, but may have lost against some.

(7) Excluding from analysis multi-defendant cases, where at least one defendant's resolution is predicated on earlier guilty plea or conviction.

(8) Excluding from analysis multi-defendant cases, where all defendants' resolutions are predicated on earlier guilty pleas or convictions.

TABLE 2.A

Logistic Regression Results (2007-2017)

	By Defendant					
	(1)	(1)	(2), (3)	(2), (3)	(2), (4)	(2), (4)
Forum ALJ	-.235 (0.24)	-.195 (0.32)	-.044 (0.24)	-.195 (0.32)	-.176 (0.25)	-.244 (0.31)
Entity Def.		.827*** (0.31)		.827*** (0.31)		.747** (0.31)
Case Category		***		***		***
	N=793	N=695	N=697	N=695	N=688	N=686

*** $p<0.01$; ** $p<0.05$. Standard errors are reported in parentheses.

TABLE 2.B

Logistic Regression Results (for cases filed between fiscal 2007 to 2012)

	By Defendant		By Enforcement Action	
	(2), (3)	(2), (3)	(2), (5), (7)	(2), (5), (7)
Forum ALJ	.300 (0.38)	-.098 (0.53)	.467 (0.48)	.282 (0.61)
Entity Defendant		1.823*** (0.31)		
Case Category		***		***
	N=472	N=471	N=203	N=202

*** p<0.01; ** p<0.05. Standard errors are reported in parentheses.

TABLE 2.C

Logistic Regression Results (for cases resolved between fiscal 2012 and 2017)

	By Defendant		By Enforcement Action	
	(2), (3)	(2), (3)	(2), (5), (7)	(2), (5), (7)
Forum ALJ	-.232 (0.27)	-.723** (0.37)	-.070 (0.37)	-.475 (0.48)
Entity Defendant		.33 (0.33)		
Case Category		***		***
	N=494	N=493	N=219	N=218

*** p<0.01; ** p<0.05. Standard errors are reported in parentheses.